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In the

Supreme Court of the United States

October Term, 1968

No. [redacted] 153

FREDERICK H. EATON,
Petitioner

- v -

STATE OF CALIFORNIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

FREDERICK H. EATON,
Petitioner in Propia Persona
P. O. Box 543
Hopland, Cal. 95449

UKIAH DAILY JOURNAL - UKIAH, CALIFORNIA

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

Your petitioner, Frederick H. Eaton, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of California entered in the above entitled case on February 21, 1968 which denied certiorari to review the sentence of the Municipal Court of the City of Oakland, California, entered on June 30, 1967.

Citation to Opinion Below

There have been no written opinions delivered by the courts below respecting this case.

Jurisdiction

The judgment of the Supreme Court of California was entered on February 21, 1968, on which date it was filed. The jurisdiction of this court is invoked under 28 u.s.c. 1257 (3) since petitioner's rights under the First and Fourteenth Amendments to the Constitution of the United States are drawn in question.

Questions Presented

1. Does Section 26209 of the California Health and Safety Code violate the freedom of speech and press clauses of the First Amendment because it includes your petitioner's booklet in its definition of "advertising"?

2. Did the California courts violate the First and the Fourteenth Amendments when they ruled that your petitioner's booklet, "A Real Stomach Ulcer Cure," was not protected by the First and Fourteenth Amendments?

3. Should your petitioner be acquitted and the decree of the lower court be reversed which convicted your petitioner of violating Sections 26281 and 26286.5 of the California Health and Safety Code, because he is protected by the First and Fourteenth Amendments to the United States Constitution in writing and publishing his booklet?

4. Should your petitioner be acquitted and the decree of the lower court be reversed which convicted your petitioner of violating Sections 26281 and 26286.5 of the California Health and Safety Code, because such conviction is in violation of the due process and equal protection clauses of the Fourteenth Amendment since your petitioner alone was arrested for an act which numerous merchants were doing unhindered for the 16 years that this law has been in force?

5. Should your petitioner be acquitted and the decree of the lower court be reversed because both acts for which he has been convicted, i.e., First, selling his booklet, and Second, Selling calcium pantothenate, are both lawful in California, and that therefore his conviction is in violation of the due process and equal protection clauses of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution, which are printed in Appendix A.

The California Health and Safety Code Sections involved are as follows: 26286.5, 26281, 26209, 26200. These will also be found printed in Appendix A.

Statement

Your petitioner was convicted June 8, 1967, after a trial by court in the Municipal Court of Oakland, California, Hon. William F. Levins presiding. Petitioner's conviction was for violation of California Health and Safety Code Section 26281 and 26286.5. On June

30, 1967, he was sentenced to 180 days in the county jail, one day judgment suspended. A notice of appeal was duly filed. The result was that the Appellate Department of the Superior Court of Alameda County, California, upheld the conviction in their decision filed on January 9, 1968. Your petitioner then sought writ of certiorari from the First District Court of Appeals, Division One, California, and certiorari was denied on January 22, 1968. Your petitioner next sought writ of certiorari from the California Supreme Court, and certiorari was denied on February 21, 1968.

The facts in this case consist of a Settled Statement of Facts together with the people's and Defendant's Exhibits from the trial below. The following facts are uncontradicted in the record. The Petitioner is primarly and predominantly engaged in the business of writing, publishing and selling books and booklets. (See Defendant's Exhibits A-1 through A-21.) On or before 1962 the Petitioner wrote, published and copywrited "A Real Stomach Ulcer Cure." The Petitioner testified that he relied on a number of sources in writing the book. They included the "United States Dispensatory," 25th Edition, pages 228-230. (Defendant's Exhibit B.) Compare, for example the "Dispensatory's statement that pantothenyl alcohol has a "beneficial effect in. . . decubital ulcers" (Id. at 330) with People's Exhibit 3-A., p. 5. The Petitioner also relied on the books of Adelle Davis, including "Let's Eat Right to Keep Fit" (Defendant's No. C.). "Let's Get Well" (Defendant's No. D.) is also widely sold in stores also carrying calcium pantothenate. The latter book includes the claim that: "When patients whose ulcers had not healed in three

years or longer were given no medication but did take 50-100 milligrams of pantothenic acid after each of three meals daily, all showed marked improvement within two to five days. . ." (Id at p. 98)
Compare this claim with the case histories in the Petitioner's booklet, pp. 2-3. The Petitioner also testified that is was his opinion that calcium pantothenate has a healing effect on ulcers of the stomach.

Subsequent to the publication and copyright of the Petitioner's booklet in 1962, which states that "Any druggist will be able to supply one with Pantothenic Acid. ." (p. 4.), he received requests to supply the drug, a harmless vitamin. Thereafter he sought and received a supply from the General Nutrition Company of Pittsburgh, Pennsylvania, after receiving their catalog in 1966 (Defendant's No. 1.) The record is uncontradicted that the Petitioner received the drug in unopened bottles and that he did not open or re-lable any of the bottles but simply sold the bottles on order for $2.95 per bottle. In 1966 he sold some 50 bottles, earning something less than one hundred and twenty dollars.

On January 11, 1967, Harvey T. Lee, an inspector for the Bureau of Public Health, Pure Food and Drug Division of the State of California, and the complaining witness in this case, sent the Petitioner a letter (People's No. 1) claiming to have "a bad stomach ulcer" and asking for a copy of the booklet, "A Real Stomach Ulcer Cure," and enclosed the purchase price of $2.99 plus tax which he remitted by check (People's No. 1-A.) The Petitioner in response mailed him a copy of the booklet (People's No. 3-A.) and a price list (People's No. 3-B.)

listing calcium pantothenate for sale; plus advertising for his books, and booklets. The inspector sent for a bottle of calcium pantothenate about one month later along with the purchase price, and received People's No. 9 and an additional and identical price list.

The only expert witness called testified that calcium pantothenate has no effect, either beneficial or harmful, on stomach ulcers and that calcium pantothenate and the books of Adelle Davis widely sold throughout California. He, moreover, testified that fluorides have an effect on dental caries, one of the diseases enumerated in Health and Safety Code Section 26286.5 along with stomach ulcers. The Petitioner introduced various examples of dentifrices claiming an effect on dental caries. (See Defendant's Nos. J. and K.)

How Federal Questions Are Presented

With respect to the petitioner's rights under the First and Fourteenth Amendments to write and publish his booklet, this issue was raised in the pleadings in the Municipal Court trial, and was repeatedly presented to all the lower courts including the California Supreme Court. With respect to the petitioner's right to equal protection guaranteed by the Fourteenth Amendment, this issue was raised in the Municipal Court trial pleadings, and was presented again to the First District Court of Appeal, Division One, of California. Federal questions are, therefore, properly presented by virtue of petitioner's claims of First and Fourteenth Amendment violations.

Reasons For Granting The Writ

At the outset it is important to raise the question why the criminal action against the Petitioner was brought. The evidence in this case is demonstrably clear that the Petitioner was not in any sense a "quack." He was engaged primarily in the publication and sale of booklets containing all manner of opinion and advice and how-to-do-it information for everything from winemaking to haircutting. (See Defendant's Nos. A-1 through A-21.) He was not engaged in the business of selling drugs, except the incidental and modest sales of calcium pantothenate and other vitamins which are not on prescription and are widely sold throughout California. His income from the drugs was miniscule. His proferred opinions regarding treatment was based on widely available ideas, also found in other books widely sold throughout California together with calcium pantothenate, by numerous merchants.

Because the prosecution in this case was marginal at best it raises important questions of statutory and constitutional law. As we view this case, it essentially involves the question as to the extent to which an individual may voice his opinions and embody them in a booklet which is actually sold for a substantial price.

Your petitioner has been convicted for violation of two separate provisions of the California Health and Safety Code—Section 26281 and 26286.5. However, as will be shown, convictions under each section ultimately rest on a single claim—that the Petitioner *advertised* a stomach ulcer cure. It will be the substance of our argument that the convictions were due to the court's

exceeding its juridiction on two grounds: First, that the definition of "advertisement" in the California Health and Safety Code Section 26209 is unconstitutionally broad and vague, and that your petitioner's rights to freedom of speech and press under the First and Fourteenth Amendments were violated thereby; and Second, that because of grossly selective enforcement of the law, your petitioner's right to equal protection under the Fourteenth Amendment has also been violated by his arrest and conviction hereunder.

1. On the First Amendment issue, the lower courts have seen fit to classify your petitioner's booklet, "A Real Stomach Ulcer Cure," as mere advertising, and include it with other advertising material involved in the case, thereby depriving it of protection under the First and Fourteenth Amendments. We would begin by noting the established constitutional principle that speech may not be constitutionally regulated merely because that speech is called advertising. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the United States Supreme Court, in holding that an advertisement in the New York Times newspaper was constitutionally protected stated: "The publication here was not a 'commercial' advertisement in the sense in which the word was used in Chrestensen. (Valentine v. Chrestensen, 316 U.S. 52.) It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. . . That the Times was paid for publishing the advertisement is as immaterial in

this connection as it is the fact that newspapers and books are sold."

Likewise your petitioner's booklet, "A Real Stomach Ulcer Cure," "communicated information, expressed opinion," and offered no drugs for sale. In fact, the author of the booklet went so far as to advise his readers that "Any druggist will be able to supply one with Pantothenic Acid. . ." (p. 4.) (People's Exhibit No. 3-A.) Such is certainly no commercial advertisement for the petitioner.

Webster's Collegiate Dictionary defines the word "advertise" as: "to make known; give public notice of; announce publicly, esp. by a printed notice; as to advertise. . . goods for sale, etc." There is certainly no advertising of calcium pantothenate for sale by your petitioner, in his booklet. Therefore his booklet must be excluded from being considered as a commercial advertisement in this case.

Advertising is never sold to the prospective purchaser of the item advertised, Furthermore, advertising is never sold at a higher price than the item it advertises. However, your petitioner sold his copyrighted booklet, "A Real Stomach Ulcer Cure," to the complaining witness, Inspector Lee, as proved by his letter (Peoples Exhibit No. 1) and his check for $3.15) (Peoples Ex. No. 1-A.) Some weeks later the Inspector wrote to your petitioner and ordered a bottle of calcium pantothenate, for which he paid $2.95 as evidenced by his money order receipt (People's No. 7.) Please note that here the complaining witness paid more for the booklet which the California courts hold to be advertising($2.99) than

for the calcium pantothenate which it is alleged to advertise ($2.95.) In all the facts of everyday life advertising is never sold thus, especially not at a higher price than the item it advertises. Unless we are expected to take leave of all the facts of life in this case, we must conclude that the California courts exceeded their jurisdiction in convicting your petitioner. Your petitioner's booklet must therefore be excluded from being considered as commercial advertising in this case.

The fact that the officials of the Food and Drug Administration do not approve the ideas presented in the petitioner's booklet does not of itself make the writings of the petitioner illegal. The ruling of the Federal court in U.S. v. American Laboratories, D.C. Pa. 1915, 222, F. 104, stated that advocating an unaccepted theory of medicine is not illegal.

In your petitioner's booklet he sets forth his opinions together with what he considers to be facts in support thereof, and seeks to make a pursuasive argument for his beliefs. In this connection we note in Thomas v. Collins, Tex. 1945, 65 S. Ct. 315, 323, U.S. 516, 89 L.Ed. 430, that "The Constitutional guarantee of free speech extends to more than abstract discussion unrelated to action, but free trade in ideas, meaning free trade and the opportunity to persuade to action, not merely to describe facts." That your petitioner in his booklet did attempt to persuade his readers to action is not of itself a reason to call his book mere "advertising" and deny it the protection of the First Amendment to the United States Constitution.

We can now turn to Health and Safety Code Section 26209. At its broadest it defines an advertisement as "all representations. . . disseminated in any manner or by any means. . . which are likely to induce. . . indirectly, the purchase. . . of drugs or devices." If read literally, the section would encompass any book discussing the scientific merits and effects of a drug if it indirectly lead to a purchase of the drug. Since the term "drug"—see Section 26200—includes substances not on prescription, which are widely available in drug stores and elsewhere, such as calcium pantothenate and other harmless vitamins, such a book could be supressed under Section 26286.5 if it claimed an "effect" on any disease named therein, presumably whether beneficial or not, and whether true or not (See People v. Ryan, 101 Ca. App. 2d 927, 929 (1951).

The State of California claims that your petitioner's booklet loses its protection under the First Amendment because your petitioner also sold a substance mentioned in the book, namely, calcium pantothenate. California claims thereby the booklet becomes a mere advertisement for the substance, calcium pantothenate, and thus can be regulated as advertising, and subject to censorship through California Health and Safety Code Section 26286.5 and the California Food and Drug Administration. Under this type of thinking a book is given protection by the First Amendment only when it is sold in a store where books alone are sold, or where at least no substance mentioned in the book is sold. However, California claims that if the storekeeper also sells other items besides books, and one of these items is mentioned in one of the books, the book thereby

loses its protection under the First Amendment and is subject to censorship as advertising. In this case, your petitioner sold calcium pantothenate, mentioned in his booklet, and your petitioner was arrested by the California Food and Drug Administration because the opinions expressed in his booklet did not agree with the opinions of the California Food and Drug Administration, and they claim the power to censor or suppress his booklet under these California Health and Safety Code sections.

Your petitioner can find no Federal legal precedents to support the position of the State of California. Under all such legal precedents it would seem that matter of opinion and information is protected by the First Amendment, and cannot lose this protection merely because a book or booklet is sold by a store or mail-order firm which also sells other items too. Your petitioner's booklet should not have been included with the advertising matter involved in this case.

Here we have a precedent in a Federal ruling which we believe has not been given sufficient weight by the lower courts, and for this reason we believe they have exceeded their jurisdiction. In Koch v. Federal Trade Commission, 206 F. 2d 311, 317 (6th Cir 1953) the evidence included a book—written by one of the defendants who was a drug manufacturer—as well as other printed material that was admittedly and obviously advertising matter. Here the court made a differentiation between the book as a vehicle of the opinions of the petitioner, and the other printed material which was obviously advertising. The court said: ". . . the record is not confined to Dr. Koch's book and his address. A

number of publications in evidence are plainly advertisements and petitioners so denominate them in their brief." The court said further: "8, 9, "The question is definitely posed because the exhibits include a book on 'The Chemistry of Immunity,' written by Dr. William F. Koch. . . which explains in detail his theory of heightening the natural immunity of the body against disease. It also contains a number of case histories together with photographs of patients before and after taking the Koch remedies. We think this book does not fall within the provisions of the statutes involved. It sets forth primarily matter of opinion". . . "We also think that if these provisions of the statutes were construed so as to prohibit dissemination of such a book they would violate the First Amendment to the Constitution of the United States." (Emphasis added.) Please note the similarity between the Koch book and the booklet of your present petitioner. In his "A Real Stomach Ulcer Cure," your petitioner sets forth what is "primarily matter of opinion" likewise, and likewise "explains in detail his theory," and his booklet "also contains a number of case histories," to quote the above opinion. We believe, therefore, that the above opinion must apply to your petitioner's booklet similarly, and that petitioner's booklet likewise should be granted protection under the First Amendment to the United States Constitution, and excluded from the advertising material involved in this case.

Likewise the fact that your petitioner sold a booklet for $2.99 and not a clothbound book would not deny petitioner protection for his booklet from the First Amendment to the United States Constitution. (Lovell

v. City of Griffin, Ga., 1938, 58 S. Ct. 666, 303 U.S. 444, 82 L.Ed. 949. Also City of Blue Island v. Kozul, 1942, 41, N.E. 2d 515, 379, 111, 511.

Also the uncontradicted evidence shows that your petitioner copyrighted his booklet in 1962 and sold his booklet for $2.99 per copy for several years before he began to sell calcium panothenate and other vitamins. And afterward he continued to sell the booklet the same as from the beginning, so that Inspector Lee paid $2.99 plus tax for it as proved by his letter and his check. (People's No. 1., and People's No. 1-A.) The booklet thus was a vehicle of opinion and should be granted protection of the First Amendment to the United States Constitution.

Furthermore, if your petitioner's booklet be granted protection under the First Amendment to the United States Constitution, then there is no evidence that will support petitioner's conviction under Section 26286.5 and Section 26281 of the Health and Safety Code of the State of California, since neither the label on the bottle of calcium pantothenate (People's No. 9) nor the reference to calcium pantothenate on the pink advertising price list (People's Exhibit No. 5.) makes any reference to stomach ulcers. Neither is there any evidence of adulteration of a drug.

2. Although these California laws have been in force for at least 16 years, and acts such as your petitioner has been accused of have openly and continuously done by numerous merchants throughout California, yet your petitioner alone has been arrested and convicted therefore. Items similar to those sold by your peti-

tioner are widely sold throughout California, yet your petitioner alone has been prosecuted for such sale, which is selective enforcement of the worst kind in violation of the equal protection clause of the Fourteenth Amendment. This testimony was uncontradicted in your petitioner's trial. In support thereof your petitioner offered in evidence the book, "Let's Get Well," by Adelle Davis (Defendant's No. D.) which contains recommendations for the use of calcium pantothenate for treatment of stomach ulcers just as your petitioner's booklet does; also offered in evidence were a bottle of calcium pantothenate tablets (Defendant's No. F-1.); and a receipt (Defendant's No. F.) which includes both the above items, showing that they were both purchased simultaneously from a Berkeley store called the "University Diet Shop," which store is only a few blocks from the headquarters of the Inspectors of the California Pure Food and Drug Administration.

Petitioner also testified that there were three additional stores in Berkeley which also sell the above items as well as other stores throughout the San Francisco Bay area, and such testimony stands uncontradicted. Petitioner also entered in evidence the book, "Nutrition Your Key to Good Health," by Carlton Fredericks, Ph. D., which also recommends calcium pantothenate for stomach ulcers (Defendant's No. G); and the book, "Feel Like a Million," by Catherine Ellwood (Defendant's Exhibit No. E), which also recommends the B Vitamins for Stomach ulcers (calcium pantothenate is a B Vitamin); both of which books were sold in stores also selling calcium pantothenate and the other B Vitamins, and other vitamins and minerals. In

addition the above books deal with many other diseases listed under Section 26286.5 of the California Health and Safety Code, and recommend various vitamins and minerals, "drugs," therefore. If the petitioner's booklet dealing with stomach ulcers be regarded as advertising, then these books are much more advertising for not merely calcium pantothenate but numerous other vitamins and minerals, all classed as drugs under this law. Because of the many diseases they discuss they are a far greater violation of this law, if it is a violation, and are widely sold throughout California together with the vitamins and minerals recommended in these other books.

Why, then, was your petitioner singled out as the only person in California in 16 years to be prosecuted for this type of alleged violation of Sections 26286.5 and 26281. The Prosecution argued the alibi that "when a highway patrolman sees several cars speeding he can arrest only one." This we believe is inapplicable to the present case, because these laws have been in force for at least 16 years, and in all these 16 years no one has ever been prosecuted for selling a book about disease and also selling related vitamins, although this alleged violation has been continuously committed by numerous other merchants in California during all these 16 years. It is more like a highway patrolman not making one arrest for speeding in 16 years, and we submit that if such a thing occurred, said patrolman would have been dismissed from the force long before the 16 years had terminated.

To make it worse, the Inspectors of the California Pure Food and Drug Administration ignored mer-

chants within a few blocks of their headquarters who were openly committing the same alleged violations as the petitioner, and said Inspectors traveled over 100 miles to arrest your petitioner. We believe this to be one of the worst cases of selective law enforcement in the history of California and a gross violation of the Fourteenth Amendment.

Futhermore, your petitioner introduced into evidence various examples of dentifrices (Defendant's No's. J, K.) which advertise on their packages and labels that they have an effect in dental caries, one of the diseases enumerated in Section 26286.5 under which your petitioner was arrested. There is no evidence that the California Department of Public Health has in any way sought to apply this law to these dentrifrices which are sold by the millions and by the millions violate the law.

Your petitioner testified that he modeled his sale of his booklet and the calcium pantothenate and other vitamins on the example set by the many other merchants in this field, who are not prosecuted, and that he was led to believe that this was a lawful and proper procedure. (The honorable judge of the trial court and the prosecuting assistant district attorney agreed that the petitioner did not willfully violate the law.)

Furthermore, the expert witness for the State, Dr. Margen, admitted under cross-examination that calcium pantothenate is widely sold throughout California by various retailers, and that books by Adelle Davis are widely sold throughout the State. (Which books recom-

mend calcium pantothenate for treatment of stomach ulcers.)

It is admittedly lawful for your petitioner to sell his booklet; such is a lawful act. It is also admittedly lawful to sell calcium pantothenate, an unrestricted drug in California; such is a lawful act. Then how is it possible that your petitioner can be convicted of violating the law for performing these two lawful acts?

(No court has explained this to me. I think I ought to be entitled to a written opinion on this fine point of California law from some court. How would you feel about it if you were in my position?)

For the above reasons, therefore, your petitioner was denied his right to equal protection under the Fourteenth Amendment of the United States Constitution.

Conclusion

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

Frederick H. Eaton,

FREDERICK H. EATON,

Petitioner in propia persona.

Dated: